mote mother country, and the whole continent, from the Gulf of Mexico to the coast of Labrador, present the unbroken outline of one compact empire of friendly and confederated states.

ART. V.—*Legal Outlines, being the Substance of a Course of Lectures now delivering in the University of Maryland.* By DAVID HOFFMAN. Vol. I. 8vo. pp. 626.

THE author of this work has, in several previous publications, such as a 'Course of Legal Study,' a 'Syllabus of Law Lectures in the University of Maryland,' and various introductory discourses delivered there, explained at large his views on the subject of legal education. In his 'Course of Legal Study,' an unpretending volume, addressed to students, he has rendered them essential service by indicating, with a just selection, the most instructive works, but especially by displaying the order in which the multitudinous parts of a various science may most usefully be considered. In none is such a systematic mode of elementary study more necessary, and in none is it more generally neglected, than in the law. The 'Syllabus' just mentioned had the same object of giving sequence and coherence to the complicated topics of legal learning, and of reducing them to a series where each should spring naturally from another, and lead easily and gradually to a succeeding one. Mr Hoffman's views on this subject are large and liberal. He demonstrates, in these publications, and in his several introductory lectures, that he has himself minutely surveyed the extensive field, whose boundaries and divisions he has described for the student. His learning is ample, his diligence indefatigable. His classification and arrangement are such, that, if strictly pursued, all difficulties (and they are many), arising from the usual want of method, must vanish, and none remain but such as are intrinsic to the science. If he opens a long path before us, he takes all pains to make it smooth; and, by his process, the abrupt steeps of jurisprudence are insensibly surmounted by a gentle acclivity.

It is evident, however, that our author does not pretend to have discovered any royal road to legal learning. He manifestly contemplates a long course of assiduity for his student,

and while he would lessen the fatigue, he would extend the sphere of his acquisitions. He aims chiefly to give his labors the right direction, and to solve for him the problem, not how to read the least (which seems to be the more common one), but how he may compass the most, and with the most understanding, in the shortest time. Thus he traces indeed each path distinctly, but he carries it far and high into the recesses of jurisprudence; he disentangles the topography, but he does not contract the limits of this particular domain of learning; he even makes excursions into contiguous regions. He has an enlarged conception of the duties and of the qualifications of the lawyer, and seeks therefore to extend his views beyond the limits of mere positive and municipal jurisprudence, so as to embrace those original principles in which it has its birth, and by which it must always be controlled and illustrated. He has accordingly devoted this first volume of his 'Legal Outlines,' the only one which has yet appeared, to a consideration of the elements of Natural and Political Law. He treats of the nature of the being who is the subject of this law; of his supposed condition before the institutions of civil society, and of the rights arising in that condition, and independent of civil government; of the origin of the latter, its true foundation, and its effects upon natural rights; of the general properties of law, and of the source and sanction of that universal 'law of nature,' which is itself the fountain and standard of all other law; of political, as distinguished from civil law; and of the various forms of government. The last lecture of the present volume contains a sketch of that remarkable system, the feudal law, which has left such strong traces in the jurisprudence of Europe and of our own country.

The entire work is designed as an analytical outline (the only one, the author remarks, which has yet appeared) of the whole body of jurisprudence proper to be studied in this country; none of the many excellent elementary works which have been published on the laws of England having aimed at presenting this complete analysis of every part. The two succeeding volumes will treat of the elements of the municipal law, including various titles which have scarcely been alluded to by Blackstone; of the law of real and personal property; of equity and mercantile law; of the law of crimes and punishments; of the Roman civil law; of the law of nations, and admiralty and maritime law; and of the constitution and laws

of the United States. Some subsidiary subjects will be appended, as legal biography and bibliography, forensic eloquence, and professional deportment. Mr Hoffman's pretensions are modest. He diffidently dedicates his book 'more especially to students,' who, he remarks, 'if they find no more in these volumes, will at least see pointed out to them the purest sources of information in the different departments of the science.' The nature of the topics discussed in this first volume has induced him to treat them in a more diffuse method, than will be observed in the remaining ones; and the whole, he hopes, may serve as an introduction to Blackstone's Commentaries, and to those of Chancellor Kent on American Law. So far as he has proceeded, the author has much more than accomplished the objects thus modestly proposed. His forthcoming volumes will complete, in our opinion, a very valuable accession to elementary legal works, so far as we may infer from the learning and the clearness with which, in that under review, he has discussed various questions of interest in ethics and natural jurisprudence, whether regarded in themselves, or in their bearing on municipal and international law.

In his exhortations to the study of ethics, natural law, universal jurisprudence, or by whatever other name it may be called, Mr Hoffman duly appreciates the informing and controlling influences of right reason, even in a technical aud somewhat arbitrary science. It is often objected to the study of our municipal jurisprudence, that, not always depending on natural principles of reasoning, and reposing, in a great degree, on precedent and decision, it fetters, instead of enlarging the mind. Men may certainly study and practise law (and doubtless not a small number do), who know no other reason why a contract should bind, than its being in writing or duly proved, and whose idea of *obligation* is an instrument under seal, or an agreement upon some consideration. As there are many able accountants, who know nothing of transcendental mathematics, and many skilful workmen equally ignorant of mechanics; so are there many clever attorneys that drive a good business, who may marvel to see Mr Hoffman beginning legal education at so remote a point as the nature of man. The point is certainly not necessary for gaining a suit, nor need we quarrel with those who think it therefore useless. But when the question is about forming able advocates, wise judges, and perspicacious lawgivers, it is plain that this ordinary education will

do no longer. When the file affords no precedent; when we are to travel out of the record; when the index presents no case in point; we are obliged to revert to first principles, and spin for ourselves that thread of ingenious deduction, which is not ready made to our hands. It is this kind of legal education that our author contemplates in his different publications, and in the work under review. Students will fill up his outline with more or less diligence. Many (for the world is not full of capacious geniuses) will slight these elementary and auxiliary studies; perhaps he himself expects few disciples of that constancy of purpose and enlarged ambition, which he would prompt and aid. The standard of science however, like that of morals, ought not the less to be set forth, because the greater part of persons may be confidently expected to fall short of it; and we are well assured, that such as explore the paths he has indicated, will neither find that they lead too far, nor fail to gather intellectual force and vivacity from the excursion.

The present volume will not be without some attractions, however, of a general nature. While it enables the law student to push his researches in a just order, and with the least waste of his energy, it may answer the different purpose of satisfying the curiosity of cursory readers on a number of interesting topics in ethics and universal law. There will be many of this sort, who, prevented from seeking the fountains from which the author has drawn, will be glad to contemplate their streams thus collected in a reservoir. Numbers read Blackstone's Commentaries with pleasure and profit, who would be appalled at the thought of mastering the tomes of black letter, which swell the knowledge, and please in the beautiful method, of those delightful volumes. And so, while the law student will learn to estimate from this work the importance of questions of natural jurisprudence, and their intimate influence on those parts of the science which are positive or conventional, others will be content to limit their inquiries into these subtile topics, by the work itself. Among these topics there are some sufficiently absurd, and in which learning and argument have been very idly squandered. These have necessarily passed under review in this volume, one part of the design of which is to save the student some useless investigations by exhibiting their futility or their folly. One can hardly know the nature and state of true learning without some knowledge of the false. For general readers, in fine, these distillations of learning, these

concentrations of the odor of the flowers of science into portable essences, are quite invaluable in the present state of letters. As the empire of knowledge expands its surface, it seems to require its easy roads and its locomotive engines. But durable reputation must continue to be founded on large and correct knowledge in a particular department; and while, in the branches of learning not nearly akin to our proper pursuits, we may bound our inquiries with the labors of the abridger or the analyzer, in those where we aim at excellence, we must only employ them as guides to larger and loftier acquisitions.

In another part of this article, we shall attempt to show how many points of municipal and international law have derived light and authority from the doctrines of natural jurisprudence. We cannot, of course, go into this very extensive subject at much length, any more than we can regularly analyze the contents of the present volume, extending, as it does, to six hundred pages, and touching on most of the questions alluded to. But we may remark, that, in turning over the work, we have been impressed with new convictions of the importance of natutural jurisprudence; and thus convinced of the salutary influence of these more general and abstract branches of legal acquirement, we must take this occasion to speak a little at large on the subject.

It may not, indeed, be very obvious at first sight to a student, why he is detained, for example, in the outset of his studies, with an examination into the unity of the species, and whether this be reconcilable with its variety of color; or into the true origin of political power, whether from divine right, inheritance, prescription, or consent of the governed; or into the actual existence and true meaning of the state of nature; or into the distinction between perfect and imperfect rights; or the extent of the right of extreme necessity, &c. &c. Yet a wrong understanding of some of these points, we doubt not, has had its share in diffusing some of the greatest moral calamities, and exciting some of the most violent political convulsions, which have desolated the race. The history of the slave trade may induce a doubt whether the victims of this tyranny could have been deemed by their oppressors to be of the same rank of being with themselves; nay, we believe it has been justified on a presumed inferiority, of which their color and shape were seriously asserted to be the badge. It will hardly be denied, that the absurd notions which have been

upheld, of the origin and sanction of political power, have contributed to the number of unwise and arbitrary kings, and of brutish and servile subjects; while false notions of what is called the state of nature, and of the rights of nature, may have added something to the folly and fury of popular and revolutionary delusions. A notion of the true distinction between perfect and imperfect right, might have wrought some modifications in the conventional law of nations, or rather that of kings; and some resorts to the right of extreme necessity might have been spared to the people, if its existence had been recognised by sovereigns, and had inspired a salutary terror in them. Again, in the identity of a state, one of the nice points which are agitated in the books, may be sometimes involved the question of indemnity for spoliations. The origin and objects of civil government enter into the vexed question of expatriation. And the distinction between the social and constitutional compact has, with very opposite results on the tranquillity of the nation, been regarded in one revolution, and lost sight of in another.

How else than by the principles of the natural law, are we to discuss the questions of religious toleration; the obligation of mere positive laws, with the distinction between *mala prohibita* and *mala in se;* the alleged omnipotence of parliament; the rights of extreme necessity (a branch of which has been already alluded to), and of harmless profit; the nullity of *ex post facto* and retroactive laws; the right to pursue fugitives and their abducted property into the territories of other nations, upon the ocean, or into regions where jurisdiction is unknown; the extra-territorial operation of civil laws; the right of capital punishment, and the true theory of punishment in general; the nature and effects of occupancy, whether particular or in gross; the appropriation of the ocean, and the doctrine of *mare clausum aut mare liberum;* the extra-patrimonial nature of certain things, such as air, running waters, &c., and the limitations of the same? How, the legality of usury, independently of positive laws; the right of parents to disinherit their offspring; the perpetuity of the marriage contract; the exclusion of aliens from inheriting or holding lands within the territory of a nation; the like exclusion in the case of personal property, and the validity of the *droit d'aubaine;* the extent of parental power, with the crime of infanticide; the numerous questions of intestacy; questions of insanity, and others in medi-

cal jurisprudence; the validity of foreign marriages; the nullity of marriages for incest, natural or civil, with the effect on this contract of prior or supervenient frigidity? How ascertain the right and extent of eminent domain, and the limitations of despotic sovereigns? All these questions of grand consideration can be solved only by a reference to the principles of the *jus naturæ et gentium*, and those also of human physiology and mental philosophy.

Many of these examples are drawn from public law; but it is equally obvious from others, that the vast body of positive enactments, decisions, precedents, and customs, which together constitute municipal law, have the same fundamental reference to universal jurisprudence. The science, however artificial and technical it may seem, has its pervading abstract principles, from which we must commence all our learning, and to which we must return for a clue, whenever the deductions from them become remote or complicated. These principles, though varied and modified by the genius of the government, or the accidental circumstances of the people, however they may 'take a tincture and taste' from regions and policies, are those of that necessary and eternal justice which we call the law of nature. Grotius, indeed, was led to the contemplation of it, and to the composition of his elaborate work, by tracing the laws of his country to their principles. The student of mere municipal laws, who begins his inquiries into them instructed in the general topics which occupy the writers on ethics and natural jurisprudence; in the nature of obligation, the meaning and essential requisites of a contract, the principles of evidence, the natural rules of interpretation, &c., will find a light continually shed on the path of acquisition, as, at a future day, he will from the same source be able to direct it on his own expositions and demonstrations. By these studies, he will only draw back, as it were, to bound forward with more effect in the field of positive legislation and judicial decision.

A different train of considerations will suggest themselves to those whose views and objects in the law are of a more enlarged kind. The code of natural equity is a body of rules deduced from the constitution and natural condition of man; or it may be considered in another aspect, as that body of rules which is the best adapted to promote his moral happiness. But innumerable accidents give rise to peculiar policies which, however adapted to instant emergencies, may thwart in

some degree the true aims of political society; and as these particular policies have also their peculiar principles, as their laws are fashioned to promote their ends, the impress of their institutions is felt long after the causes have passed away to which they owed their birth. The rule remains, though the reason of it has ceased; and the facility is wonderful, and not fully conceived by ourselves, with which we become reconciled to institutions which shock, or ought to shock, the natural justice of the mind. It is thus that the feudal nations established, and transmitted to us, the barbarous right of primogeniture, the ungentle law of baron and feme, the cruelty of escheat and attainder, the iniquitous exemption of lands, in most cases, from liability for debt; the injustice of all which, we forget from habit, or excuse because, forsooth, they have a nice consistency with the general aim of the feudal system. A student rises from the elementary writers of the common law so struck with this general coherence, that he forgets the original barbarousness of the system from which the alleged doctrines are drawn. Now though time and necessity work the cure of these defects, and gradually fashion laws to the occasions of society, it is certain that this salutary process of modification and change will be retarded in proportion as the lawyer confines himself to his indigenous jurisprudence. The pedantry thus begotten, made a large part of that jealousy of the English common lawyers, which so long resisted the benign influences of the Roman code; and if it subsists no longer, if we are prepared to select what is most convenient to our altered circumstances, or to that 'universal fitness of things' to which it is the supposed aim of all laws to approximate, our lawyers, judges, and legislators must drink at the fountains of natural equity, in order to scrutinize the written by the unwritten reason, and institute that just comparison of various codes which is a preliminary step to the improvement of any one of them.

These views of the importance of natural jurisprudence are abundantly confirmed by the testimony of lawyers and philosophers. 'Ratio ipsa,' says Bynkershoek, 'ratio juris gentium est anima.' 'The law of nature,' says an eminent jurist of our own country,* 'is the philosophy of morals;—it lies at the foundation of all other laws.' Sir James Mackintosh has indicated the just process of inquiry into it. 'We should,' he re-

* Story's Inaugural Discourse.

marks, 'first search for the original principles of the science in human nature; then apply them to the regulation of the conduct of individuals; and lastly, employ them for the decision of those difficult and complicated questions that arise with respect to the intercourse of nations.' 'Between the most abstract and elementary maxim of moral philosophy,' he continues, 'and the most complicated controversies of civil or public law, there subsists a certain connexion. The duties of men, of subjects, of princes, of lawgivers, of magistrates, and of states, are all parts of one consistent system of universal morality.'* It was the perception of the existence of this universal and necessary justice, and of the necessity of reverting to it as the standard of comparison for all positive codes, which suggested to the perspicacious mind of Bacon the notion of a philosophical system of jurisprudence, an investigation (to use his significant phrase) of the *leges legum;* an idea which, by his advice and that of Peiresc, was executed, however imperfectly, by Grotius. The same views prompted the following passage, from Adam Smith. 'It might have been expected,' he says, 'that the reasonings of lawyers upon the different imperfections and improvements of the laws of different countries, should have given occasion to an inquiry into what were the natural rules of justice, independent of all positive institution. It might have been expected, that these reasonings should have led them to aim at establishing a system of what might properly be called natural jurisprudence, or a theory of the principles which ought to run through, and to be the foundation of the laws of all nations.'

Such is the importance, and such the intimate relation with both municipal and public law, of the subjects with which Mr Hoffman has principally occupied this introductory volume. We should transcend all reasonable limits, were we to pursue the speculations which the perusal of it has awakened. We find in the first lecture, for example, a statement of the controversy respecting the unity of the species. It might not be guessed, at first view, how a physiological question, respecting the diversity of complexion and features in the different races of mankind, could involve the very foundations of natural jurisprudence. So it was, however, that some curious physiologists, having doubted the common descent of mankind from

* Mackintosh's Introductory Lecture.

Adam and Eve, a new doubt arose as to the identity of their moral constitution, and consequently as to the universal obligation of the rules of morals. This was a grave difficulty. The question as to the standard of beauty, whether the Hottentot could by any canon of taste be deemed on a footing in that respect with the European, though not less perplexing, was not quite so serious as this; which seemed to imply some doubt whether a negro might not be kidnapped and flogged with less remorse, as not being a brother of the same family; or whether there was not more reason in a Musselman's having two wives, than was generally allowed by Christian people. Our author, while he contends for the unity of the whole race, as the opinion most consistent with physical facts as well as with sacred history, remarks, however, that the diversity of species might not necessarily destroy the universality of the moral law. We certainly do entertain the same opinion. For even should we allow, that the 'crisped hair' of the Negro, and the high cheek bone of the Tartar, rendered it necessary to allot them a different genesis, it would remain to be shown how this altered their moral organization, or why moral rules must vary on their account, any more than for a dyspeptic or hypochondriac patient, both of whom would probably require, with more reason, a relaxation of them. This seems to us to be nearly the amount of all the grave argument on this question, for gravely argued it has been; and most of our author's readers will agree with him as to the universality of a code, of which the great principles have been recognised alike by all races and lineages, and 'to which Moses and Confucius, Seneca and Socrates, have rendered equal homage.'

This has been denied indeed by another class of casuists, who, with the true rage of theory, have ransacked the history of mankind and the narratives of travellers, for the horrible and unnatural in customs and institutions, and set them in terrible array against the generality and uniformity of the code of morals. Our author has given us a pretty copious list of these monstrous deviations from natural feelings and justice in his lecture on the 'Laws of Nature.' We leave it to him to reconcile these exceptions with the general rule, or rather, according to the law maxim, to prove the rule by them. But we may observe here the opposite inferences which have been drawn from these moral dissimilarities in nations. While one party deduces from them the nullity of any universal moral code,

another out of superserviceable zeal for it, has made them the apology for the most frightful barbarities. Those who excuse the actors of such enormities on the plea of ignorance, of established custom, and the like, have improperly argued from this excusableness of individuals the abstract innocence of the thing; if there is no guilt, say they, there is no penalty, and if no penalty, no law. The other party, again, have argued from the abstract error the individual guilt. Now it might have been wholesome for each to have remembered, that there exists a penalty sufficient both to supply the sanction which seemed wanting to the first, and to have dispensed with the practical zeal of the last. Every deviation from the principles of right reason is accompanied by a corresponding mischief to human happiness. This is the penalty we speak of, and it will seem sufficiently severe to such as contemplate the general condition of those nations in which these more monstrous deviations have been observed. It may not be easy to decide which of these two theories is the more erroneous; but it is not difficult to see of which the disciples have done the most harm; and it is to be wished, that the religious conquerors and the furious zealots, who have roasted misbelievers and depopulated nations for the glory of God, had been better casuists.

We shall advert here to a disquisition in Mr Hoffman's third lecture, both for the sake of the criticism contained in it, and because it leads us to notice some observations of Dugald Stewart on the science of Natural Jurisprudence. Rights have generally been divided by writers on natural law, into *perfect* and *imperfect*. Our author objects to the latter term, as inconsistent with the nature and definition of a right. A right is a power of doing or having a thing consistently with law; and to call any right *imperfect* is to say, in other words, that it is imperfectly consistent with law, a proposition not very intelligible, as there seems to be no middle point between consistency and inconsistency. The distinction arose from its being observed, that the *subject* of some rights was fixed and determinate, while of others it was vague and undefinable; a reason, indeed, why the last could not be ascertained and vindicated, but not for altering their nature, or considering them as infirm or, in the usual phrase, imperfect. There might be a difficulty, says our author, so to limit the subject of the right that it could be claimed and enjoyed, but none to originate the right itself, nor any reason to impair its completeness or per-

fection. While all rights, too, are equally rights, they are not all of equal importance; and that general utility which has originated the rules of the voluntary law of nations, would consider as subordinate such as would interfere with the exercise of others more essential to the peace of mankind and the good order of nations. These subordinate rights have likewise been classed with the imperfect; but the use of this nomenclature has produced confusion among writers, some classing as imperfect what others have recognised as perfect rights. Some phraseology would be preferable, which should indicate the importance and definiteness of rights, without seeming to impugn their equal abstract consistency with natural justice. Mr Hoffman proposes to call them *primary* and *secondary*, and *determinate* and *indeterminate*. As the abstract perfect right becomes imperfect in practice, because its extent and subject cannot be accurately defined, it might be called indeterminate; and as it is not enforced lest it should interfere with another, the rigorous exercise of which it is of more moment to sustain, it may be termed secondary.

Dugald Stewart thus explains the introduction of the distinction between perfect and imperfect rights in use among the writers on natural law. Justice, he says, is obviously distinguished from the other virtues by two circumstances; 'its rules may be laid down with an accuracy of which other moral precepts do not admit,' and they may be enforced, 'inasmuch as every transgression of them implies a violation of the rights of others.' But as jurisprudence, thus confined merely to the rules of justice, would have opened a very narrow field of study, 'its province was gradually enlarged, so as to comprehend, not these merely, but the rules enjoining all our other moral duties. Although justice is the only branch of virtue in which every moral *obligation* implies a corresponding *right*, the writers on natural law have contrived, by fictions of *imperfect rights* and of *external rights*, to treat indirectly of all our various duties, by pointing out the rights which are supposed to be their correlates. This idea of jurisprudence identifies its object with that of moral philosophy.'* The reader will perceive from these passages how the distinction of rights adverted to sprang up; and we shall not detain him with an inquiry, whether the supposition of the writers spoken of, that

* Stewart's Dissertation on the Progress of Metaphysical, Ethical, and Political Philosophy, Part I. Chapter ii. Section 3.

every duty involved a corresponding abstract right, was altogether wide of metaphysical truth.

But perhaps a clearer and more comprehensive idea of the scope and extent of natural jurisprudence may be gained by first considering the true meaning of the 'state of nature,' a topic which occupies the second lecture of this work, and which we think very happily elucidated. The state of nature then, says our author, is a hypothetical state, 'a mere *ens rationis*, a state which never had a real existence, and which is founded by philosophers on the doctrine of possible relations,' whence to deduce conclusions relative to the rights and obligations of men. This metaphysical figment contemplates man in the abstract; and the deductions from it, 'the laws of nature, would have been equally true and existent, had never an individual subsisted in a state of nature, the constitution of man being supposed to be the same as we know it to be.'* Now these possible relations cannot all be foreseen or provided for by the most perfect system of laws conceivable; and every *casus omissus*, to use the law phrase, must necessarily be referred to the natural principles of equity; so that if man never existed in a state of nature in one sense, in another he may be said never wholly to depart from it. There are rights, besides, which remain unaffected by government; others, which may revert to individuals on the dissolution of it; and a third sort, which belong to his state or community, as an independent member of the family of nations; so that the law of nature, besides that it is the standard whereby the fitness and justice of all positive laws are to be judged, is also the only code in all that vast variety of cases wherein positive legislation is silent, or where rights remain uncontrolled by civil laws; where accidents dissolve the government, or the question is between independent communities. Of these two last provinces of natural jurisprudence Dugald Stewart makes mention in the following words. 'The contrast between natural law and positive institutions, which jurisprudence constantly presents to the mind, gradually suggested the idea of comprehending under it every question concerning right and wrong, on which positive law is silent. Hence the origin of two different departments of jurisprudence, of which one refers to the conduct of individuals in those violent and critical moments when the bonds

* Legal Outlines, Lecture 2.

of political society are torn asunder; the other to the mutual relations of independent communities; on the latter so much has been written, that what was formerly called natural jurisprudence, has been in later times not unfrequently distinguished by the title of the Law of Nature and Nations.' * And thus in municipal law, (as we shall presently show,) although the conclusions drawn from the law of nature have not, as in the last instance, been separately embodied, nor taken a distinct title, they form a large and important part of the principles of elementary writers, and of the expositions of the law by courts.

Thus, the inquiry into the 'state of nature,' is not a disquisition whether men, in the words of our author, 'were at first the *mutum et turpe pecus* they are described to be by the poet;' whether society preceded the formation of language, or the latter must necessarily have preceded society; whether there was a peaceable community of goods, as, in the '*golden age*,' is depicted by the poets; nor whether there was that natural and incessant hostility painted by the more gloomy pencil of Hobbes. Neither is the inquiry into the 'rights of man in a state of nature' confined to a few 'speculations about the principles of this natural law, as applicable to men before the establishment of government.' As Mr Plowden has happily remarked, 'the qualities and properties of this state, bear the same analogy to the actual state of man in society, as the principles and properties of mathematics bear to practical mechanics.' It is this abstract and comprehensive standard of right which is contemplated in that idea of natural jurisprudence described by Stewart, of which 'the object is to ascertain the general principles which *ought* to be recognised in every municipal code, and to which it *ought* to be the aim of every legislator to accommodate his institutions.' These are those 'natural rules of justice, independent of all positive institution,' to which Adam Smith refers in a passage already quoted; 'that theory of the principles which ought to run through, and be the foundation of the laws of all nations.' This is that 'right reason' described by Cicero as 'itself a law; congenial to the feelings of nature; diffused among all men; uniform; eternal; not speaking one language at Rome, and another at Athens; addressing itself to all nations and all ages; and

* Stewart's Dissertation, Part I. Chapter ii. Section 3.

carrying home its sanctions to every breast by the inevitable punishment it inflicts on transgressors.' It is that natural law spoken of by Grotius, 'coëval with the human constitution, from which positive institutions derive all their force.' And this is the *desideratum* in science to which Bacon refers; namely, 'by investigating the principles of *natural justice*, and those of *political expediency*, to exhibit a theoretical model of legislation, which, while it serves as a standard for estimating the comparative excellence of municipal codes, may suggest hints for their correction and improvement;'—to seek out those 'leges legum ex quibus informatio peti possit, quid in singulis legibus bene aut perperam positum aut constitutum sit.' *

It is not within our scope to inquire, how far this system of natural jurisprudence has been revealed in the works of those who have written upon it. It has been objected to them, that they reason concerning laws too abstractly, and without sufficient reference to 'the particular circumstances of society to which they meant their conclusions should be applied.' † Bentham remarks that, 'if there are any works of universal jurisprudence, they must be looked for within very narrow limits;' and that writer would have those of the expository kind to be confined wholly to *terminology*, that is, to the explanation of words connected with law, as *power*, *right*, *obligation*, &c. in order to be susceptible of a universal application. Stewart's censure of this opinion must be admitted to be sufficiently light, when he says, 'He certainly carries this matter too far.' Bentham's description of Natural Law is but too just, if we confine it to the manner in which the science has often been treated by writers. He calls it 'an obscure phantom, which points sometimes to *manners*, sometimes to *laws*, sometimes to what the law *is*, sometimes to what it *ought to be*.' This is eminently true of the treatise *De Jure Belli ac Pacis*. But if the description be designed, remarks Stewart, 'for the Law of Nature, as originally understood among ethical writers, it is impossible to assent to it without abandoning all the principles on which the science of morals ultimately rests.'‡ While it may be accorded to these two writers, that an abstract code of *laws* is unphilosophical in design as well as useless in execution, the same objections can by no means be made to works

* De Aug. Scient. Lib. viii. cap. iii. De Fontibus Juris. Aph. 6.
† Stewart's Dissertation. ‡ Ibid.

professing to treat of the *principles* of legislation. We confess, then, we do not understand why the Scottish philosopher, while he admits the utility of a comparative view of the municipal institutions of various nations, should doubt 'whether this can be done with advantage by referring these institutions to that abstract theory called the *Law of Nature*, as to a common standard.' He would have 'the code of some particular country fixed on as a groundwork for our speculations; and its laws studied, not as consequences of any abstract principles of justice, but in connexion with the circumstances of the people among whom they originated.' On the contrary, such works as we have adverted to, examining and embodying such general principles as should pervade all laws, and illustrating them by a comparison with municipal laws, when either they coincided or differed, would, it seems to us, possess very obvious utility. For whether our aim was to determine the reasonableness of particular institutions, or to compare the merit of corresponding laws in different nations, it would be necessary to have some standard of comparison. How else arrive at any conclusion, either as to the reasonableness of an institution, or the respective merits of the laws compared? However philosophical it may be to estimate the policy of laws by reference to the peculiar circumstances of nations, it will hardly be denied that there are some principles quite independent of these, and which must therefore be common to all.

We think it will scarcely be denied that in one branch of jurisprudence, that part of international law we mean, which is commonly called conventional and customary, some such standard is requisite for appeal and correction. Rights have been set up on the ground of these, by the powerful and ambitious, which have been resisted on those broader grounds which are furnished by the law of nature as applied to the transactions of independent communities; and there have been writers who have insisted that the decrees of natural justice, as applied to nations, vary from its injunctions as regards man and man. To estimate aright this opinion, which has been found so convenient to long subsisting usurpation, it is necessary to advert to the distinction between the *necessary* and the *positive* law of nations; the first of which is that general and fundamental standard to which we have so often referred, and which, in the words of Hobbes, can suffer no necessary change; while the latter being, or supposed to be, founded on the first, or not

to contradict it at least, must be judged by its correspondence with, or deviation from it. This positive law of nations is of three kinds, the *voluntary*, the *conventional*, and the *customary;* the two last being those compacts which have either been positively established, or have been tacitly admitted, between the nations, and are therefore obligatory only between the parties; while the first, being such general rules as have been found convenient for the welfare and common safety of nations, is on the contrary of universal obligation. Now these conventional and customary parts of public law may, or may not, be repugnant to the necessary; and whatever may have been the practice, the compacts, or the customs of power, they must be judged by a superior law, and resisted, when wrong, by a paramount right. Examples of such usurpations, and of such resistance to them, will suggest themselves to the reader; and in order to measure that resistance, it is necessary to refer to the principles of that universal justice arising out of the constitution of men and states, and serving therefore as a test of the acts of both. Nay, as the voluntary law of nations itself must sometimes tolerate what is inconsistent with the necessary, because the vindication of the latter might interfere with general liberty and reciprocal independence, it cannot be regarded as actually and always immutable. It is a principle, for example, arising out of an obvious policy, that one nation shall not interfere with another in its internal regulations, however unjust; yet perhaps the interposition of the European Powers in behalf of Greece is not in the strictest conformity, in this respect, with the voluntary, however consistent with the necessary law of nations.

It is observed by the distinguished writer whom we have so often quoted,* that the alliance established between the law of nature and the conventional law of nations, by the writers on these subjects, had the effect of presenting more enlarged and philosophical views to the minds of speculative statesmen, and led to more liberal doctrines respecting commercial policy, and the other relations of states. But we shall now dismiss this part of the subject, and proceed to show briefly what frequent reference to these natural fountains of justice is to be found also in the decisions of the ordinary tribunals, both in England and this country.

In every country, ancient and modern, positive laws, as we

* Stewart's Dissertation.

have before remarked, must fall very short of the aims of government, and of distributive and commutative justice. Hence have sprung the prerogatives of commutation, dispensation, and pardon; hence arose the salutary jurisdiction of the Roman *prætor*, the ample powers of British and American courts of equity, and far the larger portion of the common law, in which, from time to time, and as occasion demanded, the principles of natural justice were embodied. The history of that system shows the justice of Professor Millar's remark, that, after other questions of natural justice had also become numerous, they were likewise necessarily classified according to their principles, and formed the equity system; so that law and equity went on in perpetual progression, the former continually gaining ground on the latter. Thus 'every new and extraordinary interposition is, by length of time, converted into an old rule. A great part of what is now *strict law*, was formerly considered as *equity;* and the equitable decisions of this age will unavoidably be ranked under the strict law of the next.*

Such, of necessity, was the original meagerness of positive legislation, that, had the judges regarded only the letter of the existing laws, the legislature could not have kept pace with the daily wants of the people, and the courts would have been almost without employment. By a happy, and indeed unavoidable compromise between the legislative and judicial departments of the English government, it soon came to be established in theory, and was daily reduced to practice, that there is a vast fountain of preëstablished principles or rules of adjudication, which, by a process of sound dialectic, are ascertained and applied by the judges to the new and ever-varying combinations of facts as they arise; and from this power of judicial interpretation, and application of principles to facts, the judge is said to *declare* the law, not to *make* or promulgate it. Under this view is it that the 'laws of God,' the 'laws of nature,' and the 'laws of nations,' are considered as integral portions of our common law; and in the gradual progress of adjudication through the lapse of ages, the judges, by a strict adherence to what has been called the 'principle of precedent,' and the 'principle of analogy,' have been enabled to build up the existing fabric of English and American law, which, with all its admitted defects, must still be regarded as

* Millar's Historical View of the English Government, p. 478.

surprisingly systematic. The rule of *stare decisis*, so strictly adhered to wherever title to property, and not the mere mode of procedure, is concerned, has given to that system its certainty and general equity, though at the expense of occasional individual hardship. It is manifest, therefore, that the laws of England and of this country are not to be found in the statute books only, nor in the superadded volumes of judicial reports, nor in Plowden nor Coke; nor would they be found in the most elaborate codes that could be formed. We must still draw from that exhaustless fountain of reason and abstract justice, the code of natural law, much of which is reflected in the pages of Grotius, Wolfius, Puffendorf, Vattel, Bynkershoek, and others. This code, and these authorities, have been often appealed to, and will continue to be, we hope, by British and American judges; and we have pride in perceiving that some of our American jurists have been warmly praised by their trans-Atlantic brethren,* for their exertions to make jurisprudence in this country a science more equitable and philosophical than it has been regarded in England. This they conceive is to be promoted, as Mr Du Ponceau has declared, by establishing it as a maxim, 'that pure ethics and sound logic are also parts of the common law.' † The parallelism of the Roman code with the natural law has been the boast of its admirers; and it has been the aim of some American jurists, among whom our author is to be numbered, to draw the attention of students to the consideration of that great body of wisdom, less jealousy of which in the common lawyers would have been fortunate for the improvement of the common law.

Our limits do not allow us even to glance at the numerous instances in which this view of the law of nature, as comprehended in the common law, has been sanctioned by the judges and lawyers of England. 'If any case happen for which there is no statute or precedent, common law shall judge according to the law of nature and the public good.' ‡ Blackstone, in his Commentaries, regards the law of nature as an integral part of the laws of England, and as paramount whenever they come in conflict.§ The same doctrine is inculcated by St Germain,‖

* London Jurist, for March, 1827, and Park's Contre-Projet to the Humphreysian Code, *passim*.

† Du Ponceau on Jurisdiction. ‡ Jenkins, Centu. 97, 117.

§ Commentaries, 42. ‖ Doctor and Student, Dialogue i, Chapter 5.

by Wynne,* by Bentham,† by Lord Coke,‡ Lord Hobart,§ Bracton,‖ Fortescue,¶ and many others.

The law of nature has been appealed to in numerous legal and other discussions besides those already mentioned, and the authority of writers upon it has been admitted with as much respect, as is accorded to the approved treatises on various branches of the municipal law by a Fearne, a Hargrave, a Butler, or a Preston. It was thus in the question, whether by the Common, as by the Roman law, gifts are subject to repetition for gross ingratitude in the donee.** By the civil law, an emancipated slave returned to his state of servitude for flagrant ingratitude to his master; in England, the maxim was, *Semel manumissum semper liberum.* This law was likewise appealed to on the question of *Commendam.*†† As to the means of distinguishing between things *mala in se* and *mala prohibita*, Chief Justice Vaughan, in the case of Thomas *versus* Sorrell,‡‡ delivered a most able and learned opinion, showing his intimate acquaintance with the law of nature, and the writings of Selden, Grotius, and others. (See also Foster's Discourses, Disc. ii, ch. 1; 12 Coke's Reports, 76; Lord Macclesfield's speech on Impeachments, and Stillingfleet on Resignation Bonds.) So, likewise, as to allegiance, in Calvin's celebrated case, and as to the rights of the *antenati* and *postnati*, Lord Coke greatly relies on the *jus naturæ*, and speaks of it as the *lex æterna*; and he seeks for its lights in all the treatises then known.§§ We might also here refer to the celebrated controversy between Milton and Salmasius as to the legality of the proceedings of Charles the First; to the discussions relating to the exaction of ship-money, and those relative to the dispensing power; in all which the laws of nature and nations were discussed and relied on. Nor can we omit to mention the elaborate opinions of Chief Justice Vaughan in the cases of Harrison *versus* Dr Burwell, ‖‖ and Hill *versus* Good, ¶¶ in which the law of nature

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* Eunomus, Dialogue i, Section 17.

† Fragments on Government, 109. ‡ 7 Coke 126; 3 Institutes.

§ Reports 87, 149, 225; 12 Modern, 687.

‖ Liber i, Chapter 1. ¶ Chapter 8.

** 3 Institutes, 151; Doctor and Student, Dialogue i, Chapter 6; Dialogue ii, Chapter 45.

†† Hobart's Reports, 149.

‡‡ Vaughan's Reports, 331. §§ 7 Coke, Calvin's Case, 12 b.

‖‖ Vaughan's Reports, 207—250. ¶¶ Ibid. 302—329.

was fully investigated on the subjects of incestuous marriages, and of the nullity of laws for want of promulgation. These opinions could have been pronounced only by a judge who had extended his researches much beyond the confines of the strict common law of England. In connexion with these opinions we may refer to Aughtie *versus* Aughtie,* Burgess *versus* Burgess,† Butler *versus* Gastrill,‡ Wightman *versus* Wightman,§ and finally to the question of the validity, under the *jus naturæ*, of a man's marriage with his deceased wife's sister, the affirmative of which was maintained by Mr Noah Webster,‖ and the negative by Dr Livingston.¶

The natural law has also been relied on in cases where the question was involved as to the mode of acquiring and parting with property in things *ferœ naturæ ;* and in Fennings *versus* Lord Grenville,** Gillet *versus* Mason,†† and Buster *versus* Newkirk,‡‡ it was decided on its principles, that property in such things can be gained only by possession and not by pursuit. The second of these cases, and that of Wallis *versus* Mease,§§ related to the property of a swarm of bees ; that of Pierson *versus* Post,‖‖ to the right of killing a fox pursued by another ; yet they were not settled without reference to Grotius, Puffendorf, Barbeyrac, and Bracton. A melancholy instance of a resort to one of the rights of nature, that arising from extreme necessity, is related in a note to page 124 of the 'Legal Outlines.' It is the story of the carpenter, who, with his son, was engaged in repairing a steeple in a country town. The boy was seized with a vertigo when at a lofty point of the spire ; and the father, who was a few feet below him, finding that his son's fall would inevitably involve his own destruction, gave the ladder a tilt in a direction from himself, and precipitated the child to the earth. We do not know that he was ever tried for this act of dreadful necessity.

The right of *gleaning*, as being what is called *harmless profit* by writers on natural law, was at one time held in England to be a common-law right. It has twice been the sub-

* 1 Phillimore's Reports, 201.
† 1 Haggard's Reports, 386.
‡ Gilbert's Reports, 156.
§ 4 Johnson's Chancery Reports, 343.
‖ Essay's 1790, Number 26.
¶ Dissertation, published in 1816.
** 1 Taunton's Reports, 242.
†† 7 Johnson's Reports, 16.
‡‡ 20 Johnson's Reports, 75.
§§ 3 Binney's Penn. Rep. 546.
‖‖ Caine's New York Reports, 176.

ject of legal adjudication there, and is now denied to be law.* The right to literary property, independently of positive laws, has also been discussed in England with perpetual reference to the principles of natural jurisprudence, especially in the great case of Miller *versus* Taylor.† Dependent on the principles of this universal law, and the subject of frequent judicial investigation, is also the right of *eminent domain*, or the sovereign power inherent in all governments, of appropriating private property to public uses, after just compensation made. The reader may see in what manner this subject has been treated, in Leader *versus* Moxon,‡ Rex *versus* Cook,§ case of the Isle of Man,‖ Lindsey *versus* the Commissioners,¶ the People *versus* Platt,** and Bradshaw *versus* Rodgers.††

Whether civil laws create a moral obligation to their observance, or leave it optional either to obey them or submit to their penalties, is a question which has often been made, and which can be solved only by an examination of the principles of ethics and natural jurisprudence. Moralists have generally decided in favor of the moral obligation. Blackstone, who has inculcated a contrary doctrine,‡‡ has been ably refuted by Mr Sedgwick in his 'Critical Remarks on the Commentaries,' §§ and also by Judge Tucker in an annotation.‖‖‖ In the case of Aubert *versus* Maze,¶¶ the question was as to the right to recover back moneys paid on a transaction *malum prohibitum*. The court had no hesitation to repudiate the distinction attempted to be set up, between the right of repetition in this case and where the transaction was *malum in se;* and the judges stated emphatically, that civil laws create a moral obligation to their observance. Mr Hoffman adverts several times to this topic; and his consideration of the nature of *obligation*, of *sanction*, and of the general properties of law, will set it in a point of light sufficiently clear.*

We might embrace in this view, the many discussions which have occupied English and American courts, as to slavery and the slave trade; whether the laws of any country which

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* Steel *versus* Houghton, 1 Henry Blackstone's Reports, 53; 3 Blackstone's Commentaries, 212. † 4 Burrow's Reports, 2303.
‡ 3 Wilson, 461; also Sutton *versus* Clark, 3 Campbell, 403.
§ Cowper's Reports, 26. ‖ Cited, 2 Dallas, 214.
¶ 2 Bay's Reports, 38. ** 17 Johnson, 215.
†† 20 Johnson, 103. ‡‡ 1 Commentaries, 57. §§ Pages 52—64.
‖‖‖ Tucker's Blackstone, 58. ¶¶ 2 Bosanquet & Puller, 375.
* Legal Outlines, 70, 272, 282, &c.

sustain slavery, have any extra-territorial operation, so as to call on the courts of other countries to respect the right of property in slaves; whether the slave trade be in violation of the law of nature, or of the voluntary law of nations; whether that trade be piracy independently of treaties, making it so as between the contracting parties, &c. &c. Our author, in his inquiry into the legal causes of slavery, and how the state of the parent may affect that of his offspring, admits, in the course of his volume, that it may legitimately arise from individual consent, from the necessary disposal of parents, from birth, from the obligation to make reparation for damage done to individuals or to the public, and, lastly, from just war;—all, however, with great and important limitations of the abstract doctrine. He properly distinguishes, on the general question of the alienableness of liberty, between natural, civil, and political liberty, the losing sight of which distinction has been productive of some errors. As to political liberty, when it is considered that, in its absence, no other sort, whether natural or civil, can ever be long or entirely safe, we may certainly conclude with our author, that he who 'yields it up on any occasion whatever, when it can be asserted with any prospect of success, commits such a crime against a prudent economy of his rights, as merits the appellation of a great enormity.'* Our Declaration of Independence asserts the unalienableness of liberty, and the history of human affairs seems to show it is hardly ever entirely alienated in fact. 'There will be found,' says Mackintosh, 'no institution so detestable as an absolutely unbalanced government;' nor has there been any despotism so complete as to prevent the occasional assertion, by the people, of their right to draw back the regards of their rulers to the consideration of their happiness. In these governments, a sudden struggle restores for a while, and in some degree, the balance which free policies aim to secure by regular checks *in favorem libertatis.*

Somewhat in connexion with this subject is the topic which occupies our author's fifth lecture, the 'right of civil government;' that is, on what foundation reposes the authority entrusted to rulers. An American refers that authority but to a single source, the consent of the governed; and so widely and deeply is this maxim established among us, that we hard-

* Page 138.

ly comprehend the opposite and absurd doctrines which have been applied by writers far from contemptible. We hear with incredulity, that royal authority has been defended on the score of *possession*, as if the vulgar adage were as true in politics as in litigation, and as if the *fact* of ruling ill conferred the *right* to do it; that it necessarily descended by *inheritance*, or was unalterably confirmed by *prescription* and *ancient consent*, as if the right, and, we presume, the talent to govern, might be transmitted like an heir-loom; or that it arose out of the *virtues* of rulers, according to the strange conceit of Plato and Aristotle, who held good men to be kings *de jure* and *de facto*; a doctrine which would invalidate the title of many reigns, and cast infirmity sometimes on the elections of the people. Even those who have agreed on *expediency* as the source of the right of civil government, have differed on a very important point, the advocates of kingly power being unwilling to submit to the governed the determination of this expediency; while, in this country, we refer it wholly to their judgment, that is, in the language of natural law, to 'the consent of the governed.'

By what other tribunal shall we determine either the abstract right of government or its particular form, than by this general consent, which decides even the principles of the natural law, and pronounces on vice and virtue themselves? For though, according to our author, a man's assent to actions cannot alter their quality; though there exists a 'fitness of things,' independent of all human opinion, and often mistaken by it; by what other means than human opinion is this fitness to be ascertained; where resides this expediency but in the common judgment; and how is it to be settled, in the particular matter of government, but by the consent of the governed? While this expediency, therefore, must be 'the law to each man's conscience,' there is no human tribunal to enforce that law, except such as may be established by the common consent, or, what comes the nearest to it, and is equivalent to it for this purpose, the consent of the majority; to which foundation, therefore, which is that of our own, our author refers all legitimate government.

This subject is discussed by Mr Hoffman with clearness and good sense. The same praise, indeed, may be emphatically extended to the whole of the lecture on the 'right of civil government.' The seventh, on 'law and its general properties,' evinces both research and thought; and the subject of

the source of the law of nature is well treated in the eighth. Our limits compel us to pass over several matters in the volume, which we intended to make mention of, as well to express our opinion of the manner in which they have been discussed by the author, as to prove the general interest and importance of the questions with which the work is occupied, and their connexion with the studies of the student of mere municipal laws, as well as those of the publicist and the politician. The lecture on feudal law, which concludes the present volume, the first part being a general view of that system on the continent, the second, of its particular modifications in England, is a concise but spirited and lucid abridgment of what may be found more at large in the writers on this subject.

Amidst the great variety of topics treated, or touched on, in this elementary work, we have always to praise the industry with which different opinions are collected and collated, and generally the conclusions at which our author arrives. His method is clear, and his style, for the most part, accurate and easy. Some peculiarities, among which is the occasional too lavish use of epithets, might indeed be pointed out; and he winds up his discussions too frequently with apologies for their introduction or their length. These peculiarities are least apparent when the author grows engaged in his subject, or is employed on topics purely legal. Though the work pretends to no more than the elementary or institutionary character, some of the disquisitions do honor to both the author's ingenuity and his learning. These will be received with respect by that portion of his readers, whose *recollections* only he aims to awaken, while the more familiar points of information abounding in the volume will be generally useful and satisfactory to students. His love of learning is very obvious; nor do we think he overvalues the importance of ethics and natural jurisprudence to law students. If he sometimes praises works on these subjects which have admitted defects, it is probably because he thinks them unduly neglected; for in his 'Course of Legal Study,' as well as in the work under review, he has shown that he has read them, and wishes them to be read, with due selection.

The earnest conviction, indeed, so apparent throughout the present publication, of the benign influence on the minds and studies of jurists, of ethics and metaphysics, brings to remembrance the observations of Professor Stewart on the latter; 'a

word,' he remarks, 'formerly appropriated to the ontology and pneumatology of the schools, but now understood as equally applicable to all those inquiries which have for their object to trace the curious branches of human knowledge to their first principles in the constitution of our nature.' 'Accordingly,' he continues, 'it will be found, on a review of the history of the moral sciences, that the most important steps which have been made in some of those, apparently the most remote from metaphysical pursuits, (in the science, for example, of political economy,) have been made by men trained to the exercise of their intellectual powers by early habits of abstract meditation.'

On the whole, we greatly commend the scope and general execution of the present volume; and are led to anticipate that the analytical and philosophical spirit displayed in it, will, when extended to the whole scheme proposed by the author, produce a comprehensive elementary work, both useful to students, and acceptable to the profession generally.

ART. VI.—1. *Debate in the British House of Commons on the American Tariff, July* 18, 1828.

2. *The American Tariff;* an Article in the Edinburgh Review for December, 1828.

3. *Commerce of the United States and West Indies;* an Article in the London Quarterly Review for January, 1829.

IN our late article on the 'Definitions in Political Economy' of Mr Malthus, we took occasion to allude to some remarks upon the Tariff thrown out by a writer in the Edinburgh Review, in a preceding number of that journal; and intimated that if he should, as he then expressed the intention of doing, enter upon a formal discussion of the subject in a future number, we might perhaps in turn be induced to offer some further observations upon it in reply. The writer alluded to has since redeemed his pledge, by publishing the article of which the title is quoted above. It is not, we think, very powerful in substance, or very courteous and candid in manner, and of course does not imperiously call for an answer. But as the question is still under controversy among ourselves; and as British opinions on all subjects have a good deal of weight in this country, although